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No.....

In The

Supreme Court of the United States

OCTOBER TERM, 1946

FLORENCE MARIE TOWNSEND, *nee* BARNETT; RINA URQUHART, *nee* RICHARD; WANDA CURTIS, *nee* RICHARD; GEORGE STIDHAM, Guardian of Eastman Richard, Jr., an incompetent; LEONA FOX, *nee* RICHARD; and GEORGE BARNETT, JR., a minor, by GEORGE BARNETT, SR., Guardian,

Petitioners,

VERSUS

FIRST NATIONAL BANK AND TRUST COMPANY, a banking corporation of Muskogee, Oklahoma; and H. H. OGDEN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND SUPPORTING BRIEF.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

SUMMARY STATEMENT OF MATTER INVOLVED

This petition challenges the correctness of the decision of the Circuit Court below relating to what official may

approve release of restricted Indian funds from governmental custody. The funds were individual funds derived from oil leases and held by the Superintendent of the Five Civilized Tribes in official custody for the credit of a full-blood member restricted from alienation of his lands by the provisions of the Act of May 27, 1908 (35 Stat. 312), sections 1 and 9. This statute,[1] as construed by this Court in *Parker* v. *Richard*, 250 U. S. 235, 39 Sup. Ct. 442, 63 L. Ed. 954, together with appropriate administrative regulations[2] made thereunder and construction of the statute and regulations by the Circuit Court in *United States* v. *Watashe* (C. C. A., 10th), 102 Fed. (2d) 428, require that the Secretary of the Interior approve the removal of restrictions on alienation.

The Circuit Court below in the judgment here questioned has held[3] that the approval of the Superintendent of the Five Civilized Tribes is sufficient to effect removal of such restrictions.

Suit was brought by heirs of Eastman Richard, a full-blood Creek Indian, seeking to recover certain funds, proceeds of oil production under leases on Richard's allotted and inherited lands, which had been released from the custody of the Superintendent of the Five Civilized Tribes, in Muskogee, Oklahoma, by the Assistant Superintendent. Release was made by check to Richard and endorsed by

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1 Pertinent portions of sections 1 and 9 appear post, p. 4 and 5.

2 The pertinent regulations, 25 CFR 183.20, 221.1, 221.2, 221.3, 221.4 and 221.30 are set out in the appendix to this petition.

3 The opinion of the court below is printed in the record at page 91; loc. cit. 94.

him; the funds were released to indemnify respondent Bank and its president, respondent Ogden, in their becoming sureties for Richard upon a supersedeas bond. After the bond was spent respondents failed to return the funds to governmental custody.

The Government intervened, after effecting removal of the suit from state court under the procedure provided in section 3 of the Act of April 12, 1926, 44 Stat. 239. Trial was had in the United States District Court and at the conclusion of the Government's evidence the trial court rendered judgment of dismissal on grounds that the facts and law did not entitle relief.

Thereafter the Government appealed, then dismissed its appeal; the heirs continued their appeal to conclusion in the Circuit Court.

STATEMENT DISCLOSING BASIS OF JURISDICTION TO REVIEW

a. Statutory provisions sustaining jurisdiction.

The statute under which relief is sought in this Court is Section 240 of the Judicial Code, as amended, 43 Stat. 938, 28 U. S. C. §347.

The trial court's jurisdiction existed upon the following basis: Petitioners, as heirs of Eastman Richard, an enrolled full-blood Creek Indian, commenced this action by filing a petition in the State District Court of Muskogee County, seeking to recover from respondents certain restricted funds, proceeds of allotted lands (R. 1-5). Notice of the pendency of the action was served on the Superin-

tendent for the Five Civilized Tribes (R. 6), pursuant to the provisions of Sec. 3, Act of April 12, 1926, 44 Stat. 240, and the United States petitioned for removal to the United States District Court for the Eastern District of Oklahoma (R. 5). Removal was effected (R. 7) and thereafter the Government intervened. Jurisdiction of the trial court rested upon Sec. 3, Act of April 12, 1926, 44 Stat. 240. Judgment in the trial court was rendered September 10, 1945 (R. 11); petitioners filed notice of appeal December 10, 1945 (R. 11).

Jurisdiction of the Circuit Court below rested upon Section 128 of the Judicial Code, as amended, 43 Stat. 936 (28 U. S. C. A., §225a).

b. Statute of the United States, validity of which is involved.

Involved here is the validity of Sections 1, 2 and 9 of the Act of May 27, 1908, 35 Stat. 312, which, insofar as material here, provide:

> Sec. 1. " * * * and all allotted lands of enrolled full-bloods * * * shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe."
>
> Sec. 2. "That leases of restricted lands for oil, gas or other mining purposes, * * * may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise."

Sec. 9. "That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottees; * * * ."

c. Date of judgment and date of appeal.

The judgment sought to be reviewed here was rendered November 5, 1946 (R. 95).

This petition for writ of certiorari was filed .....

Since this case raises the question whether removal of restrictions against alienation of Indian lands imposed by the Act of May 27, 1908, and subject to removal by the Secretary of the Interior may be effected by any lesser official than the Secretary, and since the court below has held that the Assistant Superintendent of the Five Civilized Tribes may remove such restrictions, it is believed that certiorari should issue to review the decision. The Circuit Court's decision construes a departmental regulation of the Secretary of the Interior in such manner as to authorize the Superintendent of the Five Civilized Tribes to disburse accumulated oil royalty funds of restricted Indians without limitation upon amount, and thus gives to a relatively minor civil service official[4] power and authority to deal with funds the security of which Congress has vouchsafed only to the Secretary of the Interior.

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[4] Since 1929 the position of Superintendent of the Five Civilized Tribes has been included within the competitive classified civil service, Act March 4, 1929, C. 705, Sec. 1, 45 Stat. 1583.

The interest of the United States in protecting the Indians against improvident alienation of their allotted lands is an historic policy of Congress (*Heckman* v. *United States*, 224 U. S. 413, 437, 32 Sup. Ct. 424, 56 L. Ed. 820) and recognized by this Court in *Sunderland* v. *United States*, 266 U. S. 226, 234, 45 Sup. Ct. 64, 69 L. Ed. 259, to be "the peculiar duty of the Federal Government to safeguard their interests and protect them against the greed of others and their own improvidence." The statute here involved implements such policy and places the determination of when such protection is no longer needed in the hands of the Secretary of the Interior. By later legislation[5] Congress has recognized that the power of removing restrictions was vested in the Secretary and not in any lesser official, *United States* v. *Watashe* (C. C. A., 10th), 102 Fed. (2d) 428, 431.

Here the Circuit Court below has given such power and authority to the Superintendent of the Five Civilized Tribes.

The question is substantial, in view of the foregoing, and because the decision below strikes at the root of the authority of the Secretary—the official chosen by Congress to carry out its policy. There are thousands of restricted members of the Five Civilized Tribes and it is common knowledge that oil production on their allotted lands has often resulted in the accumulation of large amounts of individual restricted funds in the hands of the Superintendent of the Five Civilized Tribes. The Superintendent may now,

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[5] Act of February 14, 1920, sec. 18, 41 Stat. 408, 426, 25 U. S. C. A., sec. 356.

upon authority of the decision below, in his discretion disburse the funds without regard to amount, a prerogative Congress has given only to the Secretary of the Interior.

QUESTIONS PRESENTED

FIRST: Whether individual funds of a full-blood Indian of the Five Civilized Tribes restricted under sections 1, 2 and 9 of the Act of May 27, 1908, may be released from governmental custody by act of any lesser official than the Secretary of Interior?

SECOND: Whether the appropriate regulations of the Secretary of the Interior give to the Superintendent of the Five Civilized Tribes discretionary power to disburse such funds to restricted Indians?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

In deciding that the Superintendent of the Five Civilized Tribes has unlimited discretionary power to disburse restricted funds the Circuit Court below has:

(a) rendered a decision probably in conflict with applicable decisions of this Court in *Parker* v. *Richard*, 250 U. S. 235, 39 Sup. Ct. 442, 63 L. Ed. 954, and *Sunderland* v. *United States*, 266 U. S. 226, 45 Sup. Ct. 64, 69 L. Ed. 259.

(b) rendered a decision squarely in conflict with a prior decision of the Tenth Circuit Court of Appeals in *United States* v. *Watashe*, 102 Fed. (2d) 428.

(c) rendered a decision probably in conflict with a decision of the Eighth Circuit Court of Appeals in

United States v. *Brown*, 8 Fed. (2d) 564, and a decision of the Tenth Circuit Court of Appeals in *House* v. *United States*, 144 Fed. (2d) 555.

Finally, in deciding that the Superintendent of the Five Civilized Tribes has this unlimited discretionary power of disbursement which Congress has confided to the Secretary of the Interior, the Court below has rendered a decision that will thwart the historic and oft-confirmed policy of Congress toward Indians to "protect them against the greed of others and their own improvidence" (*Sunderland* v. *United States*, 266 U. S. 226, 233, 45 Sup. Ct. 64, 69 L. Ed. 259).

Accompanying this petition is a certified transcript of the record in this case, including the proceedings in the United States Circuit Court of Appeals for the Tenth Circuit.

Wherefore, your petitioner prays respectfully that a writ of certiorari issue out of this Honorable Court directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding that court to certify and send to this Court for its review and determination on a day certain a transcript of the record and proceedings herein; and that the judgment of the court below be reversed by this Court; and that your petitioner have such further relief as to this Court may seem just.

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Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

THE FACTS

Eastman Richard was an enrolled full-blood Creek Indian (R. 21), owning both his individual allotment (R. 41) and lands he had inherited which were allotments of Jemina Richard (R. 34) and Yarna Richard (R. 36). Oil production from these allotted lands resulted in royalty payments accumulating to Richard's credit in the Indian Agency at Muskogee, Oklahoma, where they were regarded as restricted funds (R. 36, 41).

Both the trial court (R. 62) and the appellate court below (R. 94) regarded Richard's funds as restricted while in governmental custody, and this conclusion is inescapable, whether the source of the funds is Richard's own allotment (*Sunderland* v. *United States*, 266 U. S. 226, 235, 45 Sup. Ct. 64, 69 L. Ed. 259) or whether the source is the Jemina and Yarna Richard allotments which Eastman Richard inherited (*Parker* v. *Richard*, 250 U. S. 235, 239, 39 Sup. Ct. 442, 63 L. Ed. 954).

It became necessary for Richard to make a supersedeas bond (R. 26, Ex. 9, R. 77), and respondents, Ogden and the Bank, became sureties, requiring first that they have cash indemnification (R. 54). To accomplish this, $5,000.00 of Richard's individual funds were disbursed March 6, 1920, by check payable to Richard, the release of the funds being approved by the Assistant Superintendent

of the Five Civilized Tribes (R. 33). Respondents got the money (R. 24, Ex. 4, R. 71) but after the bond became spent omitted to return Richard's money to governmental custody.

Upon these facts the court below held that departmental regulations made by the Secretary of the Interior pursuant to statutory authority by clear implication authorized the Superintendent of the Five Civilized Tribes to disburse the funds (R. 94). The opinion of the Circuit Court appears at pages 91 to 95 of the transcript. Its judgment appears at page 95.

In the following argument the Secretary of the Interior will be referred to simply as the Secretary, and the Superintendent of the Five Civilized Tribes simply as the Superintendent.

ARGUMENT

I.

Where Congress has required discretionary approval of the Secretary to remove restrictions, approval of the Superintendent is not enough.

The statute involved, Act of May 27, 1908, 35 Stat. 312, insofar as material here, provides:

> Sec. 1. " * * * and all allotted lands of enrolled full-bloods * * * shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under

such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe."

Sec. 2. "That leases of restricted lands for oil, gas or other mining purposes, * * * may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise."

Considering these sections, this Court observed in *Parker* v. *Richard*, 250 U. S. 235, 240, 39 Sup. Ct. 442, 63 L. Ed. 954:

> "In the absence of some provision to the contrary the supervision naturally falls to the Secretary of the Interior. Rev. Stat. §§441, 463. *West* v. *Hitchcock*, 205 U. S. 80, 85. And see *Catholic Bishop of Nesqually* v. *Gibbon*, 158 U. S. 155, 166. There is nothing to the contrary in the leasing provision or in any other of which we are aware."

Likewise, Congress has always regarded the power of approval to have been vested in the Secretary and not in the Superintendent. In the Act of February 14, 1920, sec. 18, 41 Stat. 408, 426, Congress provided that undisputed claims[6] to be paid from individual restricted funds and uncontested leases "heretofore required to be approved under existing law by the Secretary of the Interior shall hereafter be paid, approved, rejected, or disapproved by the Superintendent for the Five Civilized Tribes of Oklahoma."

Not only did Congress regard the Secretary as the sole

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[6] "Undisputed claims" as used here means claims of third persons, and this Act does not authorize the Superintendent to approve release of funds to the Indian. **House v. United States** (C. C. A., 10th), 144 Fed. (2d) 555, 559.

repository of the power of approval but it also considered that Congressional authorization was necessary before the Secretary could delegate such power of approval to the Superintendent. In the Act of May 11, 1938, sec. 5, 52 Stat. 347, 348, Congress provided that the Secretary "may, in his discretion, authorize superintendents or other officials in the Indian Service to approve leases for oil, gas or other mining purposes covering any restricted Indian lands, tribal or allotted."

In *United States* v. *Watashe,* 102 Fed. (2d) 428, the Superintendent sought to approve a conveyance of restricted land and the Circuit Court of Appeals for the Tenth Circuit held that he had no power to remove restrictions, declaring (105 Fed. [2d] 431):

> "Without statutory authority, subordinate officials have no power with respect to the duties of an office involving the exercise of judgment and discretion."

Where Congress has expressly given to an administrative official duties involving his administrative judgment and discretion he does not thereby have implied power to delegate those duties to his subordinates; the power of delegation must be expressly given by Congress, *Cudahy Packing Co.* v. *Holland,* 315 U. S. 357, 361, 62 Sup. Ct. 651, 86 L. Ed. 895.

Here Congress withheld such power of delegation from the Secretary until 1938, when it authorized him in his discretion to permit Superintendents to approve leases of restricted lands (Act of May 11, 1938, sec. 5, 52 Stat. 347, 348).

Therefore, the approval by the Superintendent here, in 1920, of the disbursing of restricted funds, was not enough to accomplish a removal of restrictions.

II.

The appropriate regulations of the secretary have not delegated unlimited power of approval to the Superintendent in removing restrictions.

In section 1 of the Act of May 27, 1908, 35 Stat. 312, Congress has, after imposing the restrictions, said:

> "the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposition of the proceeds for the benefit of the respective Indians as he may prescribe."

And in section 2 of the same Act, Congress said:

> "That leases of restricted lands for oil, gas or other mining purposes, * * * may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise."

The Secretary has accordingly issued such regulations, the pertinent ones of which are printed in the appendix hereto. These regulations, if confined within the statutory scope, have the force and effect of the statute itself, *United States* v. *Thurston County*, 143 Fed. 287, 291; *Sunderland* v. *United States*, 266 U. S. 226, 235, 45 Sup. Ct. 64, 69 L. Ed. 259; *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, 418, 62 Sup. Ct. 1194, 86 L. Ed. 1563. And statutory

rules of construction apply, *Miller* v. *United States*, 294 U. S. 435, 439, 55 Sup. Ct. 440, 79 L. Ed. 977.

Section 25 of such regulations, now 25 CFR 183.20, provides that all royalties accruing under any lease shall be deposited by the Superintendent to the credit of the individual Indian. After providing that as to minors and Indians under local guardianship the deposit shall be to the credit of the guardian, who may make withdrawal of funds upon approval of the probate court, the regulation continues as follows:

> "The said Superintendent is authorized, however, in his discretion, where considered for the best interest of any adult, minor, or incompetent lessor, or his or her heirs, for whose account royalties, rents, or payments accruing have been paid to said Superintendent to withhold the disbursement of such royalties, rents, or payments, wholly or in part from any such adult or guardian or curator of any such minor or incompetent, or his or her heirs, until such time or times as the payment thereof is considered best for the benefit of said lessor or his or her heirs;"

The Circuit Court below thought (R. 94) this portion "clearly implies the authority of the Superintendent to disburse the funds to the lessor when, in his opinion, so to do would be for the benefit of the lessor."[7] But the section continues with a proviso:

> "Provided, That in such individual cases or classes of cases as the Secretary of the Interior may direct, the Superintendent shall cause such payments as may be authorized to be made out of the royalties and

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7 Following **American Nat. Bank v. American Baptist Home M. Soc.** (C. C. A. 2d), 106 Fed. (2d) 192, 197.

> other individual Indian funds of the restricted Indians, minors, and incompetents, to be paid direct to the Indians, entitled thereto or to be otherwise paid out for their benefit and use, as the Secretary of the Interior may authorize in said cases."

If there is any implication of general authority in the Superintendent to disburse funds from the first quoted portion of the regulation, the last quoted proviso plainly dispels any such notion. As this Court observed in a similar situation "But the proviso is there and cannot be disregarded. It obviously limits and restrains what precedes it." (*Parker* v. *Richard*, 250 U. S. 235, 238, 39 Sup. Ct. 442, 63 L. Ed. 954).

Other sections of the regulations, *in pari materia*, clearly show that the authority of the Superintendent to disburse restricted funds is limited. His blanket authority to disburse may not exceed $50.00 per month, and he must obtain specific authority for larger amounts (25 CFR 221.4). Such specific authority lapses at the end of a year (25 CFR 221.3). His request for such specific authority must go to the Commissioner of Indian Affairs and must "show clearly the necessity for the proposed expenditures" and, where it is proposed to pay to the Indian, "his competency to handle without supervision the amount requested" (25 CFR 221.2).

The Circuit Court below thought that these last sections of the regulations were general and did not "qualify the specific regulations (25 CFR 183.20) dealing with disbursement of royalties received from leases on restricted lands of members of the Five Civilized Tribes" (R. 95).

But there are several fallacies inherent in such conclusion. *First*, the court below denies all effect to the Secretary's regulation defining funds: "Individual Indian moneys are funds, regardless of derivation, belonging to individual Indians which come into custody of a disbursing agent" (25 CFR 221.1). *Second*, by divining a distinction in the regulations between funds derived from oil royalties and funds derived from whatever other source, the court below has withheld protection from the larger funds, where it is obviously more needed, and permitted the protection of the Secretary's regulations to shield only amounts that are relatively small. *Third*, the court below fails to consider together a body of regulations which are clearly *in pari materia*, and construe them into a harmonious whole to effectuate the purposes of the statute authorizing them.

That portion of 25 CFR 183.20 authorizing the Superintendent to *withhold* funds, which the court below relied on as inferentially authorizing him to *disburse* funds, is susceptible of a different construction harmonious with the other regulations if considered together with 25 CFR 221.30, which provides that if any necessity arises for withdrawing funds "except as herein provided" (*i. e.*, the $50.00 monthly limit authorized the Superintendent), the request for such extra authority must be made to the Commissioner of Indian Affairs. Clearly the authority in the Superintendent to withhold is operative upon such monthly payments in excess of $50.00 as had previously been authorized by the Commissioner under 25 CFR 221.30. This construction does no violence to any of the Secretary's regulations, but gives effect to all, and at the same time affords the same protection to all individual Indian funds regardless of derivation.

Moreover this construction places the greater supervising authority in the more responsible official; the Commissioner of Indian affairs is appointed by the President with the advice and consent of the Senate (R. S. §462; 42 Stat. 1180; 25 U. S. C. §1) whereas since 1929 the Superintendent has been selected from the competitive classified civil service lists (45 Stat. 1583; 25 U. S. C. 25a). Cf. *Cudahy Packing Co.* v. *Holland,* 315 U. S. 357, 364, 62 Sup. Ct. 651, 86 L. Ed. 895. By the decision of the court below, restricted Indian funds derived from agricultural leases, grazing or hunting and fishing privileges, etc., must, if disbursed in excess of $50.00 per month, be released by the Commissioner, whereas funds derived from oil production, which by common knowledge so greatly exceed the other as to inhibit comparison, may be released in any amount in the discretion of the Superintendent.

The proceeds of restricted Indian land are impressed with the same restrictions as the land itself, *United States* v. *Brown* (C. C. A., 8th), 8 Fed. (2d) 564, 567; *Sunderland* v. *United States,* 266 U. S. 226, 235, 45 Sup. Ct. 64, 69 L. Ed. 259. Therefore, the restrictions on such proceeds may be released only under the same conditions as the restrictions on the land. Where such proceeds had been invested in other land approval of the Superintendent to a conveyance of such land did not remove the restrictions, *United States* v. *Watashe* (C. C. A., 10th), 102 Fed. (2d) 428. Yet the court below has now said that the Superintendent may release such funds if derived from oil production. No such distinction was noted in *House* v. *United States* (C. C. A., 10th), 144 Fed. (2d) 555, where the court held that approval of

the Superintendent was not effectual to release restricted funds, and plainly approved a departmental construction of the Interior Department that the approval of the Secretary was required.

The decision below is plainly contrary to:

(a) the will of Congress expressed in the Act of May 27, 1908 (35 Stat. 312);

(b) the valid, pertinent regulations of the Secretary of the Interior made under authority of the Act;

(c) decisions of this Court in *Parker* v. *Richard,* 250 U. S. 235, 39 Sup. Ct. 442, 63 L. Ed. 954, and *Sunderland* v. *United States,* 266 U. S. 226, 45 Sup. Ct. 64, 69 L. Ed. 259;

(d) decisions of the Tenth Circuit Court of Appeals in *United States* v. *Watashe,* 102 Fed. (2d) 428 and *House* v. *United States,* 144 Fed. (2d) 555; and

(e) decision of the Eighth Circuit Court of Appeals in *Brown* v. *United States,* 8 Fed. (2d) 564.

The decision below should, therefore, be reviewed here, and reversed.

All of which is respectfully submitted.

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Of Counsel.

APPENDIX

25 CFR 183.20

All royalties, rents or payments accruing under any lease shall be deposited by the Superintendent to the credit of the Indian lessor entitled to the same. Such income belonging to any minor or other Indian under local guardianship shall be held by the Superintendent or other officer as may be designated by the Secretary of the Interior to the credit of the guardian (or curator) of such minor or other Indian under local guardianship, and shall be paid to such guardian (or curator) upon voucher executed by him and approved by the judge of the county (probate) court having jurisdiction of the estate of such minor or other Indian under local guardianship (the form of such voucher to be prescribed by the Department), or upon authority of such court in the form of an order satisfactory to said Superintendent or other officer in charge of the Office of the Superintendent of the Five Civilized Tribes. The said Superintendent is authorized, however, in his discretion, where considered for the best interest of any adult, minor, or incompetent lessor, or his or her heirs, for whose account royalties, rents, or payments accruing have been paid to said Superintendent to withhold the disbursement of such royalties, rents, or payments, wholly or in part from any such adult or guardian or curator of any such minor or incompetent, or his or her heirs, until such time or times as the payment thereof is considered best for the benefit of said lessor or his or her heirs; Provided, That such individual cases or classes of cases as the Secretary of the Interior may direct, the Superintendent shall cause such payments as may be authorized to be made out of the royalties and other individual Indian funds of the restricted Indians, minors, and incompetents, to be paid direct to the Indians, entitled thereto or to be otherwise paid out for

their benefit and use, as the Secretary of the Interior may authorize in said cases.

From the individual restricted funds derived as royalties or otherwise, no disbursements in the settlement of litigation or in payment of attorney's fees or in the purchase of or investment in real estate or in loans upon real estate shall be made except with the approval of the Secretary of the Interior thereto: Provided, however, That nothing in this section shall be construed as limiting or affecting the jurisdiction of the Superintendent as authorized by certain provisions of the Act of Congress approved February 14, 1920 (41 Stat. 408).

25 CFR 221.1

Individual Indian moneys are funds, regardless of derivation, belonging to individual Indians which come into custody of a disbursing agent.

25 CFR 221.2

Requests for authority to draw checks against individual money should be made in triplicate on Form 5-139, carefully prepared for the approval of the Commissioner of Indian Affairs except that the date of approval and the number should be left blank. All requests for authority must show clearly the necessity for the proposed expenditure and, where it is intended to pay directly to the depositor for unrestricted use, his competency to handle without supervision the amount requested.

25 CFR 221.3

Such an authority lapses at the end of a fiscal year.

25 CFR 221.4

Whenever necessary, Superintendents are hereby authorized to draw checks for monthly allowances of not to exceed $50.00 in favor of minors or adult Indians. This section should be cited as authority therefor. Specific authority must be obtained for larger amounts.

25 CFR 221.30

If the necessity arises for withdrawing individual funds except as herein provided, the disbursing agent shall submit a full explanation of the circumstances with a request in duplicate on Form 5-139 for authority to draw checks against the account. Requests submitted under this section shall be approved by the Commissioner of Indian Affairs, the Assistant Commissioner of Indian Affairs, or Acting Commissioner of Indian Affairs.

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

No. 867

OCTOBER TERM, 1946

FLORENCE MARIE TOWNSEND, *NEE* BARNETT; RINA URQUHART, *NEE* RICHARD; WANDA CURTIS, *NEE* RICHARD; GEORGE STIDHAM, GUARDIAN OF EASTMAN RICHARD, JR., an incompetent; LEONA FOX, *NEE* RICHARD; and GEORGE BARNETT, JR., a minor, by GEORGE BARNETT, SR., Guardian, *Petitioners*,

VERSUS

FIRST NATIONAL BANK AND TRUST COMPANY, a Banking Corporation of Muskogee, Oklahoma; and H. H. OGDEN, *Respondents*.

ANSWER AND BRIEF OF RESPONDENTS

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In the SUPREME COURT OF THE UNITED STATES

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vs.

FIRST NATIONAL BANK AND TRUST COMPANY, a Banking Corporation of Muskogee, Oklahoma; and H. H. OGDEN, *Respondents.*

ANSWER AND BRIEF OF RESPONDENTS.

The "Summary Statement of Matter Involved" tends to mislead (pages 1 to 3 of Petition).

It is there said:

> "This statute, as construed by this Court in *Parker* v. *Richard,* 250 U. S. 235, 39 Sup. Ct. 442, 63 L. ed. 954, together with appropriate administrative regulations made thereunder and construction of the statute and regulations by the Circuit Court in *United States* v. *Watashe* (C. C. A. 10th), 102 Fed. (2d) 428, require that the Secretary of the Interior approve the removal of restrictions on alienation.
>
> "The Circuit Court below in the judgment here questioned has held that the approval of the Superintendent of the Five Civilized Tribes is sufficient to effect removal of such restrictions."

As to funds derived from leases of "restricted lands" made with the approval of the Secretary of the Interior, *Parker* v. *Richard, supra,* merely held, "in the absence of some provision to the contrary, the supervision *naturally* falls to the Secretary of the Interior," and, in such situation, "the authority of the Secretary of the Interior to *supervise* the * * * disbursements of the royalty has not terminated."

U. S. v. *Watashe, supra,* involved only the necessity for the approval of a deed, to real estate, containing a restrictive habendum clause, where such real estate had been purchased with restricted funds.

In neither case was there anything said that would justify the conclusion that only the Secretary, himself, could remove restrictions. On the contrary, both cases hold that restricted funds shall be disbursed under the *supervision* of the Secretary of the Interior.

The statement that the Circuit Court held, "That the approval of the Superintendent of the Five Civilized Tribes is sufficient to effect removal of such restrictions," is misleading, since the restrictions to which reference is made were restrictions on land and not on money.

It is further stated (page 3 of Petition) "After the bond was spent respondents failed to return the funds to governmental custody." The record shows conclusively that the funds in question were paid to Eastman Richard by check issued and payable to him (R. 23); that the check was endorsed by him and paid to the respondent Bank; that when the liability ceased on the bond the funds were repaid by the Bank to Eastman Richard (44 and 79), more than twenty years ago. Whether Eastman Richard returned the funds to the governmental custody is not shown, but the record does show that at the time the government did have custody of large sums of money belonging to him.

And, in the "Statement Disclosing Basis of Jurisdiction to Review" (page 5 of Petition) it is said, "Since this case raises the question whether removal of restrictions against alienation of Indian lands imposed by the Act of Congress of May 27, 1908 * * * may be effected, etc. * * * " This statement is not accurate. The instant case has nothing to do with the removal of restrictions against *alienation of Indian lands.* Only money is involved.

And, further in the same connection (page 5 of the Petition) it is said: "The Circuit Court's decision * * * gives to a relatively minor civil service official power and authority to deal with funds, the security of which Congress has vouchsafed *only* to the Secretary of the Interior." At the time here in question Congress had not vouchsafed authority to any particular official. *Parker* v. *Richard, supra* (decided June 2, 1919), had just been handed down and that case was the first expression of law extending restrictions to money, and all that it held was that "the *supervision naturally falls* to the Secretary of the Interior."

The funds in question were disbursed to Eastman Richard March 6, 1920 (R. 23), and the laws and regulations must be construed as of that date.

Petitioner assigns "Reasons Relied on for Allowance of the Writ." (page 7 of Petition).

The first sentence assumes that the Circuit Court below decided that the Superintendent of the Five Civilized Tribes has *"unlimited"* discretionary power to disburse restricted funds. This is incorrect. On the contrary, a reference to the opinion of the Circuit Court below (R. 91-95) will disclose that the court expressly distinguished the present case from that of *House* v. *U. S.*, 144 F. (2d) 555.

In sub-division (a) of this section of the Petition (page 7 of the Petition) it is stated:

"(a) rendered a decision probably in conflict with applicable decisions of this Court in *Parker* v. *Richard*, 250 U. S. 235, 39 Sup. Ct. 442, 63 L. ed. 954, and *Sunderland* v. *United States*, 266 U. S. 226, 45 Sup. Ct. 64, 69 L. ed. 259."

There is no conflict, nor are the cited cases probably in conflict with applicable decisions of this Court.

Parker v. *Richard, supra,* as heretofore indicated, merely held that funds derived from the sale of restricted lands, while in the hands of the government, were restricted.

Sunderland v. *United States, supra,* involved only title to *real estate.*

In sub-division (b) of this section of the Petition, it is said that the decision is squarely in conflict with a prior decision of this same Circuit, in *United States* v. *Watashe*, 102 F. (2d) 428. That case involved only the authority of the assistant superintendent of the Five Civilized Tribes to approve a deed executed by a Creek Indian. The decision in the instant case is in harmony therewith. There is no conflict as is contemplated by Rule 5 (b) of this Court.

Sub-division (c) is set forth as an additional reason for the allowance of the writ. It states that the Circuit Court below "rendered a decision probably in conflict with a decision of the Eighth Circuit Court of Appeals" and then cites *United States* v. *Brown*, 8 F. (2d) 564.

United States v. *Brown, supra,* does not, in any manner, conflict with the decision of the Circuit Court in this case. As a matter of fact, it is in full harmony with this decision. There, the disbursement of the funds in question was authorized by the County Court (the Indian being a minor) and was made by the *Superintendent of the Five Civilized Tribes* (see 8 F. (2d) 568). In any event, the decision did not purport to do more than to determine the validity of restrictions

on lands purchased with restricted funds, and with the conditions as to the disposal thereof. It involved only the validity of the conditions inserted in what is generally known as a "Carney Latcher" deed.

The final statement in the Petition (page 8 of the Petition) refers to the historic policy of Congress to protect Indians as against the greed of others and their own improvidence.

Obviously "the greed of others" is not here involved, as the Bank repaid the entire amount to Eastman Richard (R. 44 and 79).

Apparently "improvidence" was not being considered by the Department, as the record indicates (R. 36-37) large items of disbursements paid to Eastman Richard subsequent to the disbursement here in question. In other words, Eastman Richard had a large amount of money at all times here in question.

It is to be noted that the government, while it conducted the entire trial in the District Court (R. 15 and 63) did not see fit to prosecute its appeal in this case.

ARGUMENT.

We refer to the argument of Petitioner (page 10 of the Petition). It is there said:

> "Where Congress has required discretionary approval of the Secretary to remove restrictions, approval of the Superintendent is not enough."

At the time the disbursement here in question, was made, March 6, 1920 (R. 67), there was no act of Congress expressly requiring or directing approval of the disbursement of funds belonging to the individual Indians. *Parker* v. *Richard* was decided June 2, 1919, and this merely held

that the supervision naturally fell to the Secretary of the Interior. It is to be noted that the word "supervision" is the one used. As was said in *American National Bank* v. *American Baptist Home Mission Society* (C. C. A. 2) 106 F. (2d) 192: "It is incredible that the Secretary of the Interior should have been required, by his own regulation, to authorize all the various payments for food, supplies and equipment needed by every Indian, through personal orders of himself or an assistant secretary." Petitioner cites nothing to the contrary.

Again (page 13 of the Petition), it is said:

> "The appropriate regulations of the Secretary have not delegated unlimited power of approval to the Superintendent in removing restrictions."

In the Second Circuit, the case of *American National Bank* v. *American Baptist Home Mission Society, supra,* expressly held that the Superintendent *did* have the authority to authorize disbursement of funds to the individual Indian, or to others in his behalf. In that case the regulations appear on the margin of the opinion. The same regulations apply to the instant case.

In the opinion of the court below, in this case (8th Circuit, R. 91, *et seq.),* the court considered the same regulations. Both Circuits agree.

In another case in the Eighth Circuit, *Landman* v. *Commissioner of Internal Revenue,* 123 F. (2d) 787, the same doctrine is approved.

But, it is argued (page 14 of Petition) that the section of the regulations in question continues with a proviso, and the proviso referred to is printed in full on pages 14 and 15 of the Petition. Petitioner then continues with an argument, resting the same on this proviso. In this connection,

attention is called to the fact that the regulation in question does not appear in the record in this cause.

However, if this Court will take judicial notice of these regulations, it will find that the proviso, to which Petitioner refers, and on which he bases his argument, was not a part of the regulations on the date of the transaction in question. The proviso mentioned by Petitioner was an amendment of Section 24 of the Regulations, approved by the Secretary of the Interior October 7, 1922. Consequently, it has no application to this case.

The opinion of the Circuit Court for the Tenth Circuit, in this case, delivered by Honorable Orie L. PHILLIPS, Circuit Judge, is, as a matter of fact, a complete answer to the argument of the Petitioner, herein.

It is respectfully submitted that the Petition should be denied.

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